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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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ROGER H. CORLEY, PETITIONER

v.

UNITED STATES OF AMERICA  
\_\_\_\_\_

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
DISTRICT OF COLUMBIA COURT OF APPEALS

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MEMORANDUM FOR THE UNITED STATES  
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WADE H. MCCREE, JR.  
Solicitor General  
Department of Justice  
Washington, D.C. 20530

ORIGINAL COPY

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ROGER H. CORLEY, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
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MEMORANDUM FOR THE UNITED STATES

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Petitioner asserts that he was denied effective assistance of counsel on appeal of his convictions to the District of Columbia Court of Appeals and that he was not informed of his right to petition for a writ of certiorari to this Court.

On March 30, 1976, petitioner pleaded guilty in the Superior Court for the District of Columbia to two counts of armed rape, in violation of 22 D.C. Code 2801 and 3202, and one count of armed kidnapping, in violation of 22 D.C. Code 2101 and 3202. The pleas were submitted under the doctrine of North Carolina v. Alford, 400 U.S. 25 (1970). In exchange for his guilty plea, the government agreed to dismiss 51 remaining counts against petitioner. Prior to sentencing, petitioner filed a pro se motion to withdraw his guilty plea, and four days later petitioner's attorney requested leave to withdraw as appointed counsel. Counsel's request was granted, and on

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June 22, 1976, another attorney was appointed to represent petitioner.

On September 1 and October 5, 1976, a hearing was held in the Superior Court on petitioner's motion to withdraw his plea. At that time petitioner testified that his first attorney had failed to consult with him for any significant amount of time, inform him of the possible sentencing consequences, or arrange for a private psychiatric examination as promised (Sept. 1 Tr. 3-26). The attorney testified, however, that he had consulted at length with petitioner on three separate days and had informed petitioner that he could receive three consecutive life sentences (Oct. 5 Tr. 12-18, 20, 26). Following the hearing the court denied petitioner's motion to withdraw his plea, finding that petitioner had failed to establish any reason for its withdrawal (Oct. 5 Tr. 36). Petitioner was then sentenced to consecutive terms of 15 years to life imprisonment on each rape count and 10 years to life imprisonment on the kidnapping count.

On appeal, counsel for petitioner argued that petitioner was deprived of effective assistance of counsel in connection with his plea by the failure of counsel to ensure that petitioner understood the consequences of his plea, to discuss the possible sentence fully, and to obtain a psychiatric examination for petitioner. Counsel also argued that the trial court erred in not allowing petitioner to withdraw his plea because he did not understand its consequences. The District of Columbia Court of Appeals affirmed petitioner's conviction on December 21, 1977, holding that the district court did not abuse its discretion in denying petitioner's motion to withdraw his guilty plea (Pet. App. A).

On March 30, 1978, petitioner filed a pro se petition for rehearing en banc, asserting that he had been denied effective

assistance of counsel on appeal because counsel had failed to raise a number of issues petitioner wanted to present to the court of appeals. The petition for rehearing was denied on July 8, 1978 (Pet. App. B).<sup>1/</sup>

In his pro se petition to this Court, filed more than 11 months after denial of his untimely petition for rehearing in the court of appeals, petitioner argues (Pet. 1, 2, 7, 16-17) that appellate counsel did not inform him that his conviction had been affirmed or of his right to petition for a writ of certiorari. Implicit in the latter contention, and in the fact of his filing a pro se petition in this Court, is the further contention that petitioner was not afforded the assistance of counsel in preparing his petition. Petitioner's appellate counsel has informed us, however, that he sent a letter to petitioner on January 5, 1978, at the Lewisburg, Pennsylvania address that is also set forth on petitioner's pro se petition to this Court, informing him of the decision by the panel of the court of appeals. Counsel also informs us that he wrote petitioner again on January 11, 1978, informing him of his right to petition for rehearing or for a writ of certiorari and that counsel's authority to represent petitioner had terminated, and suggesting that petitioner seek the assistance of counsel in the Lewisburg area if he wished to petition for rehearing or for a writ of certiorari.

Thus, although there appears to be an unresolved factual question whether petitioner was informed that his conviction had been affirmed by the court of appeals and that he had a right to petition for a writ of certiorari, it appears to be

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<sup>1/</sup> Petitioner states (Pet. 7) that he did not learn until August 2, 1978, through correspondence with the clerk's office at the court of appeals, that the petition for rehearing en banc had been denied. The order denying rehearing en banc (Pet. App. B) indicates, however, that a copy was sent to petitioner at the District of Columbia Jail.

undisputed that petitioner was not offered the assistance of appointed counsel under the District of Columbia Criminal Justice Act in preparing his petition for rehearing in the court of appeals or for a writ of certiorari.

The Court held in Wilkins v. United States, No. 78-5885 (April 30, 1979), that an indigent person convicted in federal district court has a right under the Criminal Justice Act, 18 U.S.C. 3000A, to the assistance of counsel in filing a petition for a writ of certiorari to this Court. See also Doherty v. United States, 404 U.S. 28 (1971); Schreiner v. United States, 404 U.S. 67 (1971). The Criminal Justice Act does not apply to the Superior Court of the District of Columbia or the District of Columbia Court of Appeals. 18 U.S.C. 3000A(1).

In the District of Columbia Criminal Justice Act, Pub. L. No. 93-412, Congress has expressly provided for the appointment of counsel to assist indigents charged with criminal offenses in the Superior Court and on appeal in the District of Columbia Court of Appeals. D.C. Code 11-2604. It is not clear on the face of that Act whether appointment of counsel is also contemplated to assist in the preparation of a petition for a writ of certiorari to this Court. Although D.C. Code 11-2604(b) and (c) refer only to payment for representation in the Superior Court and the Court of Appeals, Section 11-2603 provides that a person for whom counsel is appointed "shall be represented at every stage of the proceedings from his initial appearance before the court through appeals, including ancillary matters appropriate to the proceeding" (compare 18 U.S.C. 3006A(c)), and Section 11-2604(d) contemplates payment for representation "other than before the Superior Court or the District of Columbia Court of Appeals." Moreover, we have been informed by the Office of the Clerk of the District of Columbia Court of Appeals that appointed

counsel have in the past been reimbursed under the District of Columbia Criminal Justice Act for the preparation of a petition for a writ of certiorari.

Although petitioner's certiorari petition is substantially out of time under Rule 22(2) of the Rules of this Court, we suggest that the Court may wish to grant the petition, vacate the judgment of the court of appeals, and remand the case to the court of appeals for appropriate proceedings, including a determination whether the District of Columbia Criminal Justice Act confers a statutory right to the assistance of counsel in filing a petition for a writ of certiorari, a determination whether petitioner was offered the assistance of counsel, entry of judgment reaffirming petitioner's conviction, and the possible appointment of counsel to assist petitioner in preparing a timely petition for a writ of certiorari. Wilkins v. United States, supra.

In view of this recommended disposition, we do not address petitioner's argument in his pro se petition that he was denied the effective assistance of counsel on appeal to the court of appeals.

It is therefore respectfully submitted that the petition should be granted and the case remanded in accordance with the suggestions made in this memorandum.

WADE H. McCREE, JR.  
Solicitor General

AUGUST 1979